

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

GABRIEL CHAVEZ, et al.,

Plaintiffs,

No. C 22-06119 WHA

v.

SAN FRANCISCO BAY AREA RAPID  
TRANSIT DISTRICT,

Defendant.

**ORDER RE DEFENDANT'S  
MOTION IN LIMINE NO. 7**

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BART seeks to exclude all evidence and argument concerning work undertaken by plaintiffs' opposition expert, Dr. Harvey Risch, after the preparation of his Rule 26 report (Dkt. No. 81).

This is not the first controversy involving Expert Risch. Earlier, BART moved to strike Expert Risch's opposition report and exclude his testimony in its entirety (Dkt. No. 58). The grounds for that motion were as follows. On November 17, 2023, BART timely disclosed its list of issues on which it intended to offer expert testimony (Dkt. No. 58-1 at 6-8). On January 16, BART again timely disclosed the opening reports of two experts: Dr. Joseph Lewnard, an epidemiologist, and Nancy McClellan, an industrial hygienist (*id.* at 10-16). Plaintiffs' opposition reports were due on January 30. Four days before the due date, plaintiffs' counsel asked BART for more time (*id.* at 193-195). BART extended the professional courtesy of a two-day extension (*ibid.*). Plaintiffs' counsel came back on January 29 and informed BART of

1 a two-week delay and asked for a stipulation to extend expert discovery (*id.* at 197). The  
2 reason given was Expert Risch’s preoccupation with a “major case” (*ibid.*). BART declined  
3 (*ibid.*). Plaintiffs’ counsel did not seek relief from the Court. On February 13, a paralegal  
4 emailed BART the late-disclosed opposition report, two weeks late and seven days before the  
5 close of expert discovery (*id.* at 208-209). In response, BART stated that “[i]f plaintiffs intend  
6 to offer Dr. Risch as a witness, they need to seek permission from the Court. Until that  
7 happens, there is no basis for a deposition” (*id.* at 205-206). The judge did not become aware  
8 of plaintiffs’ late disclosure until BART filed its motion to strike and exclude on February 26.  
9 Trial was already set for April 22, 2024.

10 In the interest of allowing plaintiffs to present their opposition, BART’s motion to strike  
11 was denied (Dkt. No. 65). Plaintiffs, however, were ordered to make Expert Risch available  
12 for deposition by March 13 and to pay all costs and fees caused by their delay, while  
13 defendants were ordered to produce reply reports by March 14 (*ibid.*). Expert Risch was  
14 deposed on March 13. Defendants, meanwhile, produced reply reports dated March 12 (Expert  
15 McClellan) and March 13 (Expert Lewnard) (Dkt. No. 108). Trial was postponed to July 8.

16 Relatedly, plaintiffs had failed to timely file Expert Risch’s declaration in support of  
17 plaintiffs’ motion for summary judgment and in opposition to defendant’s cross-motion for  
18 summary judgment. Again, that declaration was nevertheless considered in the March 18  
19 summary judgment order (Dkt. No. 72).

20 Moving now to the present controversy, BART seeks to exclude all evidence and  
21 argument concerning additional work undertaken by Expert Risch *after* the preparation of his  
22 late-disclosed opposition report. BART’s motion is based on facts that first came to light  
23 during Expert Risch’s March 13 deposition. There, BART learned that Expert Risch had not  
24 reviewed the Rule 26 reports of BART’s experts Lewnard or McClellan when drafting his  
25 opposition (Risch Depo. at 64:7-15, 67:15-18, 98:2-22). As to McClellan, Expert Risch  
26 conceded outright that he did not review *any* of her work product when writing his  
27 “opposition,” and that the latter “doesn’t address Ms. McClellan’s report in any manner” (*id.*  
28 67:15-18). As to Lewnard, Expert Risch claimed to have spent “a couple hours maybe”

analyzing Lewnard’s opening report prior to preparing his opposition (*id.* at 64:13-15).

However, it was discovered during deposition that plaintiffs’ counsel had never given Expert Risch Lewnard’s report: they had instead sent him Lewnard’s summary judgment declaration (*id.* at 98:2-22).

After the submission of his late-disclosed report, but before his deposition, Expert Risch read Lewnard’s summary judgment declaration “more carefully,” and read McClellan’s summary judgment declaration for the first time (again under the belief that these were their respective opening reports) (*id.* at 66:2-19). *As a result, he came to his deposition armed with new opinions not contained within his opposition report* (*id.* at 66:9-68:23). Those opinions were embodied in a set of written notes that Expert Risch shared with BART’s counsel during his deposition (Dkt. No. 85 at 950-953). He stated that the opinions above the dashed lines were “done contemporaneous or before I prepared my report,” while everything below “was done after I prepared my report” (Risch Depo. at 68:21-23).

BART now asks that Expert Risch’s testimony be limited to those matters stated in his (late) opposition report. They request that:

“Dr. Risch should not be permitted to testify concerning the additional criticisms of Dr. Lewnard’s work that he developed after preparing his Rule 26 report.”

“Dr. Risch [should not] be permitted to testify that he reviewed and considered Dr. Lewnard’s report, because he had not done so when preparing his own report or even before his deposition.”

“Dr. Risch should not be permitted to testify concerning any criticisms of McClellan’s work. He did not review any of her work before preparing his own Rule 26 report, and [he] did not review her report at all before his own deposition.”

(Dkt. No. 81 at 5).

“[A] party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.” Fed. R. Civ. P. 26(a)(2)(A). “[T]his disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case.” Fed. R. Civ. P. 26(a)(2)(B). That report must contain “a complete

1 statement of all opinions the witness will express and the basis and reasons for them.” Fed. R.  
2 Civ. P. 26(a)(2)(B)(i).

3 A party “must supplement or correct its disclosure . . . in a timely manner if the party  
4 learns that in some material respect the disclosure . . . is incomplete or incorrect, and if the  
5 additional or corrective information has not otherwise been made known to the other parties  
6 during the discovery process or in writing.” Fed. R. Civ. P. 26(e)(1). The duty to supplement  
7 disclosures “extends both to information included in the [expert] report and to information  
8 given during the expert's deposition.” Fed. R. Civ. P. 26(e)(2). “A party may not cure a failure  
9 to disclose an expert opinion in a written report by supplementing the expert's disclosure with  
10 later deposition testimony.” *Foshee v. Zuniga*, 2021 WL 1947560, at \*8 (N.D. Cal. May 14,  
11 2021) (Judge Virginia DeMarchi). A party that “fails to provide information or identify a  
12 witness as required by Rule 26(a) or (e) . . . is not allowed to use that information or witness to  
13 supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially  
14 justified or is harmless.” Fed. R. Civ. P. 37(c)(1). The violating party bears the burden of  
15 showing substantial justification or harmlessness. *Yeti by Molly, Ltd. v. Deckers Outdoor*  
16 *Corp.*, 259 F.3d 1101, 1107 (9th Cir. 2001). In plaintiffs’ counsel’s words, “how counsel have  
17 conducted themselves to that point,” and whether they have displayed a “cavalier approach to  
18 the rules” is of “particular[ ]” importance to the Rule 37 inquiry (Audiotape: Mar. 6, 2024,  
19 Motion Hearing, 21:40).

20 This is now the second time that plaintiffs have attempted to skirt the rules and sandbag  
21 BART. The first time around, plaintiffs were allowed to file a late opposition report on  
22 condition that the expert sit for a deposition (among other conditions). However, plaintiffs’  
23 attempt to *again* sandbag BART *at that very deposition* will not be allowed.

24 Expert Risch’s direct testimony at trial will be limited to the contents of his opposition  
25 report. Any opinions not contained within the four corners of the report are out for purposes of  
26 direct examination. New opinions contained in the portion of Expert Risch’s deposition notes  
27 prepared after the submission of his opposition report (those “under the dashed line”) are  
28 excluded for purposes of direct examination. BART’s own experts did not have an opportunity

1 to evaluate those opinions, or to respond to them in their own replies, which were prepared  
2 prior to Expert Risch's deposition. Nor was BART's counsel afforded a reasonable  
3 opportunity to test these new opinions at deposition.

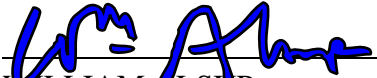
4 The problem of Expert Risch having read the declaration, rather than the report, of Expert  
5 Lewnard is not fatal, though it can be raised on cross-examination. Likewise, the problem of  
6 never having read any of Expert McClellan's work can be addressed on cross-examination.  
7 What *is* fatal, after one forgiveness of lateness, is being late again with a batch of new  
8 opinions. The latter are excluded on direct examination of Expert Risch. On cross-  
9 examination of Expert Risch, however, if BART's counsel asks a question that implicates  
10 matters outside the opposition report, then, of course, the answer of Expert Risch may go  
11 beyond the four corners of his report.

12 Now a warning to BART. At trial, Experts Lewnard and McClellan will be limited on  
13 direct examination to what is in their opening reports. If BART's direct examination of  
14 Lewnard or McClellan strays beyond the four corners of their reports, then counsel may be  
15 allowed equal latitude in their direct examination of Expert Risch. The cross-examination of  
16 BART's experts will, of course, be limited to the scope of the direct examination, but not  
17 necessarily to the four corners of the witness's report.

18 In that connection, Expert Risch must testify in plaintiffs' case on rebuttal, *after* Lewnard  
19 and McClellan. The opinions contained in Lewnard and McClellan's reply reports must, in  
20 turn, be reserved for sur-rebuttal.

21  
22 **IT IS SO ORDERED.**

23  
24 Dated: June 21, 2024

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26   
27 WILLIAM ALSUP  
28 UNITED STATES DISTRICT JUDGE